United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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76-7217

To be argued by
MARTIN C. SEHAM

United States Court of Appeals

For the Second Circuit

VANTAGE STEAMSHIP CORPORATION,
Plaintiff-Appellant,

against

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT VANTAGE STEAMSHIP CORPORATION

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I

The findings of the district court with respect to Vantage Steamship Corporation's antitrust cause of action were inadequate and erroneous.

Point I of the brief of the National Maritime Union of America, AFL-CIO ("NMU") to this Court quotes considerable portions of the district court's decision by Judge Thomas P. Griesa, but fails to come to grips with the antitrust argument in the brief of Vantage Steamship Corporation ("Vantage") to this Court. Judge Griesa ex-

plicitly declined to decide the questions of whether the restraint-on-transfer provision in Article I, Section 2 of the NMU labor contract constituted a *per se* violation of §1 of the Sherman Act, 15 U.S.C. §1, and whether an exemption from the federal antitrust laws was available to the NMU by virtue of the so-called labor exemption of 15 U.S.C. §17 (1431a-1432a). Point II of Vantage's brief specifically stated the basis for a decision by this Court that the restraint-on-transfer provision constituted a *per se* violation of the federal antitrust laws and that the labor exemption did not apply. Since the NMU's brief made no attempt to reply to Vantage's brief on these points, Vantage's argument is unrefuted and this Court should find accordingly.

With respect to the antitrust aspects of this case, the NMU relies exclusively on the finding of Judge Griesa that the proximate cause of the damage suffered in this case was the preliminary injunction issued by Judge Marvin E. Frankel at the behest of the NMU (1432a). In Point I of its brief to this Court, Vantage pointed out the reasons why that decision was erroneous, with citations to appropriate supporting authorities; the NMU's brief failed to respond to that reasoning and the cited authorities.

Instead, the NMU's initial contention in its brief on the issue of proximate cause is that the Frankel injunction constituted, in the context of tort, a "superseding cause because it occurred *subsequent* to the negotiation of the collective bargaining agreement and subsequent to the arbitration award, . . ." (emphasis in original text) (NMU brief at 13). There is no discussion of the meaning of

"superseding cause", and no reference to supporting case law or statute. Judge Griesa did *not* make any such finding in his decision. Thus, the NMU's argument on this point consists only of its bald statement of its contention.

Judge Griesa's finding on proximate cause was made, as noted in Vantage's brief, without citation to any supporting authority. The NMU's brief also failed to provide references to supporting authorities. Instead, it cited various cases, involving vastly different factual circumstances, considered to support the proposition that resort to the courts cannot result in liability for the plaintiff, absent malicious prosecution. The cornerstone of this argument is the NMU's contention that all it did was to go to court. *This is simply not true.* The fact is that the NMU engaged in a boycott violative *per se* of the federal antitrust laws, as well as going to the district court in support of that boycott. Proximate cause for an antitrust violation is determined by the statutory requirement that the injuries occur "by reason of" the antitrust violation. 15 U.S.C. §15. Consistent interpretation of these words of the statute, and consistent application of the tests devised in connection therewith by the courts in the past, require that the NMU's *per se* illegal boycott, underlying and concurrent with the application for the preliminary injunction, not be absolved by this Court; see Point I of Vantage's brief to this Court.

The record in this case is replete with evidence of the NMU's unyielding and uncompromising stand, both prior to the issuance of Judge Frankel's injunction and afterwards when the NMU knew the National Labor Relations Board ("NLRB") considered the restraint-on-transfer

clause illegal and was taking steps to have it so declared.* The NMU was ruthlessly enforcing a boycott; one device utilized—and exploited!—was the preliminary injunction, issued without full trial on the merits of the case. Having been successful before Judge Frankel, the NMU now seeks to shift all the burden and blame to Judge Frankel as an

* On February 5, 1971, Commerce Tankers Corporation ("Commerce") officers met with NMU officers to attempt to resolve the problems which had arisen; although Commerce offered to make up any union pension fund contributions "lost" by the sale of the S.S. Barbara (though none would have been lost because of the industry guarantee of pension fund contributions; see Vantage brief at 30-31), the NMU refused to permit the sale (698a-700a). After Vantage filed a complaint with the NLRB, District Judge Inzer B. Wyatt issued a decision (55a) on February 19, 1971 permitting the sale of the vessel if a bond were posted to cover "lost" pension fund contributions and if Vantage filed an undertaking to put the NMU, if it ultimately succeeded in its action, in the same position it would have been if the restraining order were continued (57a); Vantage gave the undertaking (58a) but the NMU persuaded Judge Frankel to restore the restraining order before the bond could be posted (297a, 1317a). In March 1971, Commerce had an opportunity to sell the S.S. Barbara foreign, pleaded with the NMU to be allowed to do so, and was rebuffed (703a-706a, 747a-754a, E58-E59). In June 1971, District Judge Thomas P. Croake issued a decision (159a) indicating the court was ready to vacate the Frankel injunction because of the "severe and avoidable" economic hardship imposed on Vantage and Commerce, on the conditions previously proposed by Judge Wyatt (181a-182a); the NMU, on reargument, prevented the lifting of the injunction on the basis of a procedural technicality (183a). In approximately August 1971, Commerce had another opportunity to sell the S.S. Barbara foreign, if the NMU would have given assurances to the buyer that it would not attempt to enforce its labor contract on the buyer; the NMU refused to give these assurances, and that sale was also lost (761a-765a, E60-E61). These incidents are exemplary of the rigid and uncompromising position adopted and unreasonably maintained by the NMU, despite Judge Wyatt's view of the equities of the situation, despite Judge Croake's view of the hardships imposed on the companies, despite the NLRB's actions to have the restraint-on-transfer clause declared illegal, and despite the devastating economic consequences imposed on Vantage and Commerce. The tragedy of the loss is compounded by the fact that it could have been avoided, and the NMU would have suffered no harm by virtue of Vantage's undertaking (58a).

expedient means of escaping its responsibility. Recent events confirm the aggressiveness of the NMU boycott, and undermine the NMU's contentions that it merely sought a good faith determination of the legality of the restraint-on-transfer clause; see the footnote, Vantage's brief at 23. In 1976, well over *two years* after this Court declared the restraint-on-transfer clause illegal under §8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(e), and while Judge Griesa was still considering the NMU's claims of good faith in writing the district court decision, the NMU invoked the clause against one of its contracted companies and prevented the proposed sale of a tanker by that company. *National Maritime Union of America, AFL-CIO and Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO and Mathiasen's Tanker Industries, Inc.*, Case No. 2-CE-90, N.L.R.B., Region 2 (1976). The Frankel injunction was merely the tip of the iceberg in this case. This Court should not permit the NMU to focus concern exclusively on the erroneously issued injunction and to divert attention from its illegal boycott.

The principal case cited by the NMU in its brief is *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), and that case is distinguishable. In *Noerr*, it was established that all that the original defendants in the action had, in fact, done was to join together to conduct a publicity campaign and to attempt to persuade the legislative and executive branches of government to enact certain laws and adopt certain law enforcement practices. The Supreme Court specifically noted the practices complained of

> ". . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act,

> combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, *boycotts,* market-division agreements and other similar arrangements." (Emphasis added) 365 U.S. at 136, 81 S.Ct. at 529.

In *Noerr,* literally all the defendants did was "to go to court."* There was not, as there is in the instant case, conduct violative *per se* of the federal antitrust laws; the petition to the "courts" in *Noerr* was not, as it was in the instant case, an integral part of an entire course of conduct violative of the federal antitrust laws.

United Mine Workers of America v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585 (1965), adds nothing to *Noerr* in this respect. In that case, while the Supreme Court decided that a joint effort involving the mine workers union to influence a public official was not violative of the Sherman Act, it did hold the union might be liable under the Sherman Act for conventional trade restrictive practices which were associated with the attempt to influence the public official. Similarly, the NMU should be held to account for its restrictive boycott.

California Motor Transport Co. v. *Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609 (1972), although heavily relied on by the NMU in its brief, actually contradicts the proposition espoused by the NMU. In that case, the Supreme

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* In *Noerr,* the defendants actually petitioned the legislative and executive branches, not the judicial branch.

Court upheld the general right of access to courts but qualified that right where related illegal conduct was involved:

> "Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. *Yet that does not necessarily give them immunity from the antitrust laws.*
>
> *It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.*" (Emphasis added) 404 U.S. at 513-14, 92 S.Ct. at 613.

The point the Court was making was that freedom of petition, or other rights, cannot be so expansively interpreted as to prevent legitimate enforcement of antitrust laws. This is precisely what threatens to happen in this case, *viz.*, the NMU's blatantly illegal conduct may be condoned because the NMU petitioned the district court in an attempt to further its boycott.

The remaining lower court cases cited by the NMU present no different circumstances. In *Semke* v. *Enid Automobile Dealers Association,* 456 F.2d 1361 (10th Cir. 1972), the defendants were alleged to have conspired to have the state motor vehicle commission take action against a license violation. In *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969), the action complained of was the obtaining of an exclusive franchise for disposal services from the local executive, the County Commission. In *Bracken's Shopping Center, Inc.* v. *Ruwe,* 273 F.Supp. 606 (S.D. Ill. N.D. 1967), the defendants were alleged to have conspired to test the validity of a local

ordinance in court. Thus, in every case cited, all the defendants did was "to go to court." There was no conventional restrictive trade practices, such as a boycott, involved. On that basis, the cases are distinguishable.

The NMU's entire defense in this case is summarized in its simplistic statement that all it did was "to go to court." The petition to the court was only one ploy, albeit a successful one in this case, of a concerted effort to enforce the illegal boycott, as witnessed by the NMU's uncompromising stance until the NLRB prevailed before this Court in declaring the restraint-on transfer clause illegal, and as further witnessed by the NMU's 1976 efforts to invoke the clause. The arbitration pursuant to the collective bargaining agreement and the subsequent petition to the district court were a means of *implementing* the illegal restraint-on-transfer clause, just as the "threatening" telephone call by Charles Sovel, the NMU's attorney, to Philip Corletta, Vantage's president, insisting that Vantage accept the NMU as the representative of the unlicensed seamen aboard the S.S. Barbara (1131a-1133a), was an effort to *implement* the restraint-on-transfer clause, and just as the NMU's 1976 demands to Mathiasen's Tanker Industries, Inc. that the restraint-on-transfer clause be observed, were a means of *implementing* the clause. For the boycott to be maintained, it was required that the restraint-on-transfer clause be implemented if circumstances indicated a violation might occur. One means was a possible strike, since paragraph (d) of the restraint-on-transfer clause (E18) specifically provided that the "no strike" clause of the collective bargaining agreement did not apply if the restraint-on-transfer clause were violated; another means

was to attempt to implement the clause through arbitration provided for in the collective bargaining agreement. The point is that there was a continuous chain of conduct by the NMU linking the initial demand by the NMU that the restraint-on-transfer clause be adopted, to the NMU's efforts to implement the clause against the sale of the S.S. Barbara, to the damage suffered by the steamship companies. In tracing the cause of the damages in the case, the links in the chain must be traced back to the beginning, to the adoption of the clause; to trace the links only part of the way would be arbitrary and indefensible. Judge Frankel's improperly issued injunction did not stand alone. The effort to maintain the boycott, to restrict trade, was the context for the injunction, and the action of the district court in granting the injunction should not be permitted to insulate the NMU's broad course of conduct from liability under the antitrust laws flaunted by the NMU.*

* Before the district court, Vantage vigorously contended that the action of the NMU in enforcing a contract provision violative of §8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(e), by arbitration and court action was itself coercive conduct violative of §8(b)(4) of the NLRA, 29 U.S.C. §158(b)(4), giving rise to a cause of action for damages under §303 of the Labor Management Relations Act, 29 U.S.C. §187. Judge Griesa rejected this argument (1428a-1430a). Vantage's position on this issue has recently been adopted by an NLRB Administrative Law Judge in three related cases before the NLRB. *Shopmen's Local No. 545, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO and Aluminum and Iron Specialties Corp.*, Case No. 22-C 649; *Shopmen's Local No. 545, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Elizabeth Iron Works, Inc., Structural Steel and Ornamental Iron Association of New Jersey, Inc.*, Case No. 22-CE 32; *Shopmen's Local No. 545, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Aluminum and Iron Specialties Corp.*, Case No. 22-CE-33, N.L.R.B. (1976). These cases are illustrative of a discernable policy of the NLRB to recognize the act of "going to court" to be coercive in certain circumstances and therefore violative of the federal labor laws. Vantage and Commerce continue to press their claims under 29 U.S.C. §187 in this Court; see Commerce's brief to this Court at 40.

Vantage made a second point in its brief on the issue of proximate cause which the NMU brief also completely ignored (Vantage brief at 13-15). The district court erred in considering the wrongful injunction the sole reason for the loss of the SoCal charter in that it failed to consider the effects of the restraint-on-transfer clause which arose wholly apart from the injunction and which prevented Vantage from obtaining a replacement vessel to fulfill the SoCal charter.

As was pointed out in Vantage's brief, at 15, the burden of proof lay with the NMU to prove that its illegal boycott caused no harm to Vantage. *Klinger* v. *Baltimore and Ohio Railroad Company*, 432 F.2d 506 (2nd Cir. 1970). Nowhere in the voluminous record of this case is there a shred of evidence offered by the NMU to meet this burden. Further, Judge Griesa's decision is devoid of any specific finding of fact that no damage occurred apart from the injunction; his conclusory finding that the injunction was the proximate cause of the damage fails to respond to this point.* Thus, Vantage should at least be entitled to recovery of that element of its damages constituted by the loss of the SoCal charter.

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* Because the NMU neglected to plead any affirmative defense based on proximate cause, and since the issue of proximate cause became submerged in the defense that the NMU's liability was limited by the amount of the injunction bond, the district court may not have focused on the fact that it was the NMU's burden to plead and to prove the allegation that no damage occurred other than by reason of the injunction.

II

The district court erred in limiting the NMU's liability to the amount of the injunction bond.

The argument in the NMU's brief on the issue of wrongful injunction is an extension of its argument on the antitrust issue: the district court, in the person of Judge Frankel, made the mistake and the NMU should not be made to pay for the court's error.

The NMU takes issue with Vantage's reliance on *United States Steel Corporation* v. *United Mine Workers*, 456 F.2d 483 (3rd Cir. 1972), *cert. denied*, 408 U.S. 923, 92 S.Ct. 2492 (1972), which permits recovery for wrongful injunction beyond the amount of any bond in appropriate circumstances. The objections taken by the NMU demonstrate a failure to carefully read the *United States Steel* case and a lack of understanding of basic tenets of national labor policy.

Firstly, the NMU attempts to distinguish the instant case from *United States Steel* on the grounds that the injunction in *United States Steel* was clearly granted under §7 of the Norris-LaGuardia Act, 29 U.S.C. §1107, while the injunction in the instant case was not (NMU brief at 27, 30). In point of fact, the court in *United States Steel* had nothing in the record specifying the authority under which the bonds were required. 456 F.2d at 489. Nevertheless, the court held that

> "... in any case involving a labor dispute the liability of the plaintiff ... for loss, expense or damage, including attorneys' fees, under §7 of the Norris-LaGuardia

> Act shall be fixed by the court without regard to any limitation in an injunction bond." 456 F.2d at 493.

The point is that it is not critical that the bond be granted under §7, if the case involves a labor dispute which might be covered by §7.

Secondly, the NMU contends the bond in the instant case was granted under Rule 65 of the Federal Rules of Civil Procedure, on the basis of a reference to Rule 65 in the Order to Show Cause (5a) signed by Judge Wyatt (NMU brief at 30). It would be completely irrational to permit a procedural choice, made by the wrongdoer before the injured party is even made a participant in the case, to insulate that wrongdoer from liability for his improper action. Yet this is the rule the NMU advocates herein. The reference to Rule 65 was made in a document, the Order to Show Cause, executed before Vantage or Commerce were parties to the case and before they could be heard on this question. It is inconsistent with the holding of *United States Steel* to deny recovery where §7 would otherwise be applicable. Moreover, paragraph (e) of Rule 65 specifically provides that the Federal Rules of Civil Procedure "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee"; thus, if §7 of the Norris-LaGuardia Act provides for recovery of damages in excess of any bond posted, Rule 65 does not superimpose a limit thereon.

Finally, the NMU asserts that §7 of the Norris-LaGuardia Act could not have applied to the instant case, originally a suit to enforce an arbitration award, citing *Textile Workers Union of America* v. *Lincoln Mills of Ala-*

bama, 353 U.S. 448, 77 S.Ct. 912 (1957) (NMU brief at 30-32). That case is miscited by the NMU. The case states:

> "The congressional policy in favor of the enforcement of *agreements to arbitrate* grievance disputes being clear, there is no reason to submit them to the requirements of §7 of the Norris-LaGuardia Act." (Emphasis added). 353 U.S. at 458-59, 77 S.Ct. at 919.

The NMU failed to distinguish between enforcement of agreements to arbitrate, which is what the Supreme Court was speaking about, and enforcement of arbitration awards, which is what was involved in the instant case. There is undoubtedly a strong national policy in favor of arbitration of labor disputes as an economical, speedy and efficient means of settling such disputes and limiting their disruptive influences on production. The salutary effects of the arbitration process prevent the usual case from being referred to the courts. In support of this policy, stricter procedural rules such as those embodied in §7 need not apply to cases to compel arbitration. However, in the instant case, the labor arbitration required by the NMU collective bargaining agreement was held. The petition to the district court was not to enforce an agreement to arbitrate, but rather to enforce an illegal "hot cargo" clause also violative of the federal antitrust laws. It is preposterous for the NMU to seriously contend that the strong public policy in favor of the arbitration of labor disputes can be transferred to the enforcement of a blatantly illegal "hot cargo" trade-restrictive provision contrary to public policy and diametrically opposed to the public interest, by asserting that the same liberalized procedural rules should apply to the enforcement of such a clause as to the enforcement of an agreement to arbitrate. It is beyond the

realm of possibility that the Supreme Court ever intended such a result in *Lincoln Mills*.

This view is confirmed by the case of *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960), which is a part of the so-called "trilogy" of cases by the Supreme Court relating to labor arbitrations pursuant to a collective bargaining agreement. *United Steelworkers*, unlike *Lincoln Mills*, involved enforcement of an arbitration award. While the Supreme Court reiterated its unequivocal support for enforcing agreements to arbitrate, it declared an arbitration award "is legitimate only as long as it draws its essence from the collective bargaining agreement"; when this is not the case, "courts have no choice but to refuse enforcement of the award." 363 U.S. at 597, 80 S.Ct. at 1361. A clause which is illegal under the labor laws or under the antitrust laws is void and unenforceable, and cannot be made part of a labor contract; any award based solely on such a clause cannot "draw its essence" from the valid provisions of the collective bargaining agreement and, by the rule of *United Steelworkers*, courts must refuse enforcement of such an award. It is difficult to imagine an agreement to arbitrate which would be illegal, but an award itself might very well be based on a collective bargaining provision which was illegal—as in the instant case; this distinction is the basis for eliminating the requirements of §7 in enforcing agreements to arbitrate, but not in enforcing arbitration awards.

The NMU acted in a rigid and unyielding manner in this case, reckless to all interests other than its own. It has been guilty of a violation of the federal labor laws, con-

ducted a boycott in violation of the federal antitrust laws, admits liability for wrongful injunction, bulldozed the maritime industry to accept the restraint-on-transfer clause, drove Vantage to the edge of bankruptcy and deprived Commerce of the value of most of its assets, and continues in 1976 to attempt to bend and evade the established law on "hot cargo" clauses as determined specifically in relation to its own illegal restraint-on-transfer clause. This Court should not permit the NMU to avoid its responsibility by shifting the entire blame for all the losses caused to Judge Frankel's shoulders.

Conclusion

The judgment of the lower court should be reversed and judgment should be granted to Vantage for the full amount of its injuries.

Respectfully submitted,

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Service of 8 copies of the
within Brief is hereby
admitted this 13th day of
Sept. 1976
Signed Allen & Pinney
Attorney for Respondent-Appellee

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Dated 9/13/76 [illegible]
PHILIP [illegible]
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